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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JACQUELYN MITCHELL,

Appellant,

v.

ANTOINETTE KAPLAN
LINGELBACH,

Respondent.

G057641

(Super. Ct. No. 30-2018-01029869)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Aaron W. Heisler, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Motion to dismiss. Granted. Appeal dismissed.

Knitter & Knitter, David G. Knitter and Maureen M. Roberts for Appellant.

Silverstein & Huston, Steven A. Silverstein, Mark W. Huston and Robert I. Cohen; Bennett Katzman, James D. Riddet and Michael R. Williams; Law Offices of Marjorie Fuller and Marjorie Fuller for Respondent.

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This appeal is from an interim order for the payment of attorney fees from trust funds to defend a contest of amendments to the trust. Respondent moved to dismiss the appeal as moot because the Probate Court issued a subsequent order under Probate Code section 1310, subdivision (b), granting the identical relief as granted in the appealed order. (All undesignated statutory references are to the Probate Code.) For the reasons explained below, we conclude the motion to dismiss has merit. Consequently, we dismiss the appeal as moot.

I

BACKGROUND

Gerald Anthony Lingelbach (Bud)¹ died in August 2018, at the age of 83. He was survived by his spouse of three years, respondent Antoinette Kaplan Lingelbach (Antoinette), and his only child, appellant Jacquelyn Mitchell (Jacquelyn). Bud created a trust in 2007 (the Trust), which he thereafter amended and restated several times. The Trust provided Bud was the trustor and trustee during his lifetime, and the designated successor cotrustees of the Trust were initially Jacquelyn and a friend of Bud's, Alfred Martini (Alfred).

After marrying Antoinette in 2015, Bud executed an amendment to the Trust which among other changes added Antoinette as a successor cotrustee. Half a year later, Bud executed another Trust amendment which deleted Jacquelyn as one of the successor cotrustees, leaving only Antoinette and Alfred in that position. Antoinette and Jacquelyn are both beneficiaries of the Trust.

A. Underlying Probate Litigation

At Bud's death in 2018, Antoinette and Alfred succeeded Bud as cotrustees of the Trust. Jacquelyn soon filed the underlying action: a petition to invalidate several

¹ Because all the individuals involved in this case are related by marriage, friendship, or birth, and two share a last name, we refer to all individuals by their first names for clarity and efficiency. We intend no disrespect.

of the amendments and restatements of the Trust on grounds of lack of capacity, undue influence, mistake, and fraud. Jacquelyn sought to remove and surcharge Antoinette as cotrustee; to restrain her from using Trust assets to defend the litigation; to compel Antoinette to prepare an accounting; and to cancel beneficiary designations and deeds acquired by Antoinette and her adult children. Jacquelyn sued Antoinette in her multiple capacities: as an individual; as cotrustee of the Trust; and as trustee of five other purportedly adverse trusts. Jacquelyn did not sue Alfred, the other cotrustee.

One or more of the contested Trust instruments contains an express provision authorizing the cotrustees to defend at Trust expense any action contesting any amendments to the Trust or its validity. Alfred, however, refused to sign joint consent documents to withdraw funds from the Trust's deposit account maintained at Wells Fargo Advisors (the Wells Fargo account) for the defense of Jacquelyn's action. The account had an approximate balance of \$4.8 million dollars. Wells Fargo refused to disburse Trust funds to Antoinette absent a court order, citing "conflicting claims regarding ownership and/or control of the [Trust's account]."

Antoinette filed an ex parte application seeking an order allowing her to access the funds in the Wells Fargo account so she could defend the action challenging the Trust instruments. The probate court held two contested hearings; the second hearing focused solely on whether Antoinette had the independent financial ability to defend the Trust contest without accessing Trust assets. The court took the matter under submission, and issued a ruling granting the requested relief.

In the minute order, the probate court stated it found Antoinette had discretionary authority to use Trust assets to defend the contest. The court explained this finding did not end the matter, however, and suspended Antoinette and her cotrustee's discretionary power to use Trust assets to defend the Trust without prior court approval, reasoning the suspension was needed to protect the assets in the event Jacquelyn

prevailed in the action. Nevertheless, the court allowed Antoinette to access the funds because it found she needed the money.

The minute order stated: “It appears the only substantial liquid assets available to Antoinette are the proceeds of a hard money loan and a retirement account. The loan comes due in a few months and withdrawals from the retirement account are subject to significant penalties and taxes.” Consequently, the court concluded, “Antoinette is without sufficient, available liquid assets to defend the [Trust] without access to the funds in the [Wells Fargo account].”

The probate court ordered “an initial withdrawal” of \$150,000 from the Wells Fargo account to be paid to Antoinette’s attorneys for deposit into the firm’s client trust account “to pay counsel’s fees and costs incurred only in defense of Jacqueline’s claims challenging any provision of the [Trust] and/or any amendment thereto (including any issues inextricably intertwined with Jacqueline’s trust challenges).” The court further ordered Antoinette “may apply for an additional withdrawal from the [Wells Fargo account]” if it appears “the moneys withdrawn pursuant to this order are or will soon become inadequate to continue funding Antoinette’s defense of the trust[.]”

Jacquelyn immediately appealed the probate court’s interim attorney fees order. (§ 1300, subd. (e) [appeal may be taken from order directing payment of attorney fees].) Jacquelyn also promptly posted a bond to stay enforcement of the fees order. (§ 1310, subd. (e)(1) [appeal stays order for payment of money if bond posted as provided in Code Civ. Proc., § 917.1].)

B. The Section 1310, subdivision (b), Motion and Order

In response to Jacquelyn’s actions to stay enforcement of the attorney fees order pending appeal, Antoinette filed a motion to deem the bond inadequate and to lift the stay under Code of Civil Procedure section 995.910. Antoinette also moved under section 1310, subdivision (b), (the section 1310(b) motion), to lift the stay pending appeal for the purpose of preventing injury or loss to Antoinette, as she was the only cotrustee

defending the Trust against Jacquelyn's challenge, and she needed the Trust funds to defend the Trust.²

The probate court conducted two hearings on the section 1310(b) motion to lift the stay, and eventually issued an order granting the motion (the section 1310(b) order). Specifically, the court ordered: "that pursuant to [] section 1310(b) the stay of this proceeding resulting from [Jacquelyn's] filing of a bond on May 6, 2019, which followed [Antoinette's] April 25, 2019 notice of appeal of the Court's April 25, 2019 Order authorizing the disbursement of funds from the Wells Fargo Account in the name of the [Trust] to [Antoinette's] attorneys to defend [Jacquelyn's] challenge to the [Trust], will be and hereby is lifted. [¶] Antoinette is authorized to set aside \$150,000 and no more at this time for litigation only. Any additional future requests will need a new motion." The court also issued a separate order directing Wells Fargo to "make an initial payment of" \$150,000 to Antoinette's attorneys of record for deposit in the firm's trust account. Jacquelyn did not appeal these orders.

Thereafter, Wells Fargo issued a check for \$150,000 to the attorney-client trust account of Antoinette's attorneys of record. The firm deposited the check and applied it toward already accrued fees and costs.

After Jacquelyn filed her opening brief on appeal, Antoinette filed a motion to dismiss the appeal as moot, based on the trial court's order granting her section 1310(b) motion which effectively granted the same relief as the appealed order. Jacquelyn filed opposition to the motion to dismiss and we issued an order stating the motion would be decided in conjunction with the appeal.

² We discuss section 1310, subdivision (b), at length, below. Simply put, this Probate Code statute "provides for an exception to the automatic appellate stay, permitting the probate court's discretionary retention of jurisdiction in limited circumstances, notwithstanding the pendency of an appeal[.]" (*East Bay Regional Park Dist. v. Griffin* (2016) 2 Cal.App.5th 734, 743 (*East Bay*).)

II

DISCUSSION

Jacquelyn contends the probate court abused its discretion in granting Antoinette's order to show cause permitting Antoinette's use of Trust assets to defend the petition challenging Trust amendments. Jacquelyn asserts the order granting Antoinette interim fees "violates fundamental legal principles" for numerous reasons. For example, Jacquelyn argues Antoinette has a patent conflict of interest in the litigation because she responded to the petition in her capacity as trustee of five trusts—"her own and her children's trusts"—all of which have interests in the litigation adverse to the interests of the Trust. Jacquelyn also contends the fees award was improper because the petition "creates a dispute between Antoinette and Jacquelyn as competing residual beneficiaries and the outcome of the dispute will not benefit the Trust itself, but only the prevailing beneficiary."

Antoinette argues we need not address the merits of any of Jacquelyn's arguments on appeal for the simple reason the section 1310(b) order rendered the appeal moot. Antoinette cites case law holding that when an order under section 1310, subdivision (b), grants relief identical to that granted by an order on appeal, the appellate court can provide no relief from the appealed order. Under that circumstance, the appeal is moot and subject to dismissal. Antoinette contends this rule applies to Jacquelyn's appeal. As we explain below, we conclude Antoinette's argument for dismissal of the appeal has merit.

A. Applicable Law

When a judgment or order of the probate court is stayed on appeal due to the automatic stay applicable to most probate appeals (§ 1310, subd. (a)) or, as here, due to the posting of a bond by a party appealing from an order for the payment of money (§ 1310, subd. (e)(1)), a unique provision in the Probate Code provides an end run around the stay. Section 1310, subdivision (b), provides that, "for the purpose of preventing

injury or loss to a person or property, the trial court may direct the exercise of the powers of the fiduciary . . . *as if no appeal were pending.*” (*Ibid.*, italics added.) Actions taken under section 1310, subdivision (b) while the appeal is pending “are valid, irrespective of the result of the appeal.” (*Ibid.*) In other words, an appeal cannot stop a trustee’s act pursuant to a section 1310, subdivision (b), order, and the appeal, even if meritorious, cannot reverse the effects of that act.

East Bay, supra, 2 Cal.App.5th 734, illustrates the decisive impact of an order under section 1310, subdivision (b). *East Bay* involved a dispute over a 16.65-acre parcel of land (the Danville property) which was part of a trust estate faithfully administered by a successor trustee after the trustor’s death. According to the terms of the trust, at the trustor’s death the successor trustee, Noelle Flanagan, was required to distribute the Danville property to East Bay Regional Park District (the District) for use as an agricultural park. That gift, however, was subject to an option agreement the trustor entered into with Sidney Corrie, Jr. (Corrie). The trustor gave Corrie an option until June 2011 to purchase 10 acres of the Danville property.

After the trustor died, Flanagan and Corrie amended the option agreement, giving Corrie until 2013 to buy the acreage. The District sued in probate court to remove Flanagan as trustee, arguing she had misused trust assets and improperly extended Corrie’s option to obtain funds for her personal use. Before the petition could be adjudicated, Flanagan died and a new trustee was appointed. The new trustee filed an accounting showing Flanagan had misused significant funds from the trust, sinking it into near insolvency.

Eventually, the probate court considered two competing petitions regarding the Danville property. Corrie petitioned for an order instructing the trustee to convey the Danville property to him subject to the option agreement, and the District petitioned for an order instructing the trustee under section 17200 to distribute the Danville property to the District and to receive an \$800,000 loan from the District. (*East Bay, supra*,

2 Cal.App.5th at pp. 739-740.) The District argued receipt of the loan was necessary for the trustee to service the trust's debts, pay its estate and property taxes, and cover its operational costs, given the trust's dire finances resulting from Flanagan's malfeasance. (*Id.* at p. 740.)

Corrie's petition went to trial first on the bifurcated issue of whether the option agreement was void for failing to condition sale of the property on compliance with the Subdivision Map Act (Gov. Code, § 66410 et seq.). (*East Bay, supra*, 2 Cal.App.5th at p. 740.) The probate court ruled the option agreement was void and unenforceable from its inception. Corrie appealed and the Court of Appeal reversed, sending the matter back to the probate court for further proceedings.³ (*Ibid.*) Meanwhile, the District's competing petition went forward.

After a contested hearing on the District's section 17200 petition, the probate court granted the petition and ordered the trustee to receive the loan and distribute the Danville property to the District. (*East Bay, supra*, 2 Cal.App.5th at p. 741.) Corrie appealed the order, which automatically stayed its enforcement. The District then filed a petition under section 1310, subdivision (b), to lift the stay, arguing the trust was at risk of defaulting on its loans and losing the Danville property through foreclosure. (*Ibid.*)

Section 1310, subdivision (b), provides in pertinent part as follows:

"Notwithstanding that an appeal is taken from the judgment or order, for the purpose of preventing injury or loss to a person or property, the trial court may direct the exercise of the powers of the fiduciary . . . as if no appeal were pending. All acts of the fiduciary pursuant to the directions of the court made under this subdivision are valid, irrespective

³ Eventually, the probate court ruled Corrie had no enforceable option to purchase the Danville property because the original option expired and Flanagan had no authority to extend the option. (*East Bay, supra*, 2 Cal.App.5th at p. 742.) An unpublished portion of the opinion affirmed the ruling. (*Id.* at p. 747.)

of the result of the appeal. An appeal of the directions made by the court under this subdivision shall not stay these directions.”

The probate court heard evidence and argument on the District’s section 1310, subdivision (b), petition, and thereafter granted the petition, directing the trustee to perform the acts previously ordered under the section 17200 petition. Corrie also appealed the section 1310, subdivision (b), order. The court of appeal dismissed both appeals as moot.

The *East Bay* court explained the acts of a trustee taken pursuant to a section 1310, subdivision (b), order are effectively *unreviewable* because the statute declares the acts “valid, irrespective of the outcome of an appeal[.]” (*East Bay, supra*, 2 Cal.App.5th at p. 743.) The court stated, “[A]n appellate court may not reverse an order made pursuant to section 1310, subdivision (b) to the extent doing so would disturb acts of the trustee taken pursuant to statute. Moreover, where a section 1310, subdivision (b) order grants relief identical to that of the underlying order on appeal, the statute effectively deprives an appellant of his or her right to appeal altogether.” (*Id.* at p. 744.) As the court noted, “[W]e cannot reverse the section 17200 order without also invalidating the acts of the trustee taken pursuant to section 1310, subdivision (b), which would be a direct violation of the statute.” (*Id.* at p. 745.)

The *East Bay* opinion noted the “extraordinary” situation created by the statute’s validation of actions taken pursuant to section 1310, subdivision (b): “We recognize depriving a litigant of his or her right to appeal is an extraordinary measure. But the Legislature appears to have determined that, in certain cases, expeditious resolution of disputes is more important than allowing for a right of review.” (*East Bay, supra*, 2 Cal.App.5th at p. 744, fn. omitted; accord, *Gold v. Superior Court* (1970) 3 Cal.3d 275, 281-282 [considering virtually identical statute applicable to guardianship and conservatorship proceedings, Supreme Court concluded, “By validating the conservator’s acts ‘irrespective of the result of the appeal’ . . . the Legislature has created

an extraordinary procedure” which “effectively deprive[s] the appellant of his appeal”]; *Sterling v. Sterling* (2015) 242 Cal.App.4th 185, 195 [sale of Clippers basketball team by trustee pursuant to section 1310, subdivision (b), order “cannot be ‘undone’” because it was valid regardless of outcome on appeal].)

B. Analysis

Antoinette argues this appeal is moot under the case law. We agree.

The appealed order for interim attorney fees directed Antoinette to use \$150,000 of Trust assets to pay her attorneys to defend the Trust challenge. The appealed order further provided Antoinette could apply again for additional attorney fees if needed. The subsequent section 1310(b) order granted essentially identical relief to Antoinette. Pursuant to the section 1310(b) order, Antoinette paid her attorneys the \$150,000 for their fees.

As a matter of law, that action taken by a trustee pursuant to section 1310, subdivision (b) is “valid, irrespective of the outcome of an appeal.” (*East Bay, supra*, 2 Cal.App.5th at p. 743.) Consequently, we cannot reverse the section 1310(b) order. Nor can we give Jacquelyn relief from the appealed order. As the court explained in *East Bay, supra*, 2 Cal.App.5th 734, “[W]e cannot reverse the [appealed order] without also invalidating the acts of the trustee taken pursuant to section 1310, subdivision (b), which would be a direct violation of the statute.” (*Id.* at p. 745.)

Given our inability to provide any effective relief on appeal, we conclude the appeal is moot and subject to dismissal. (*In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1315 [“[w]hen no effective relief can be granted, an appeal is moot and will be dismissed”].)

III

DISPOSITION

Motion to dismiss is granted. The appeal is dismissed as moot.

Respondent is entitled to her costs on appeal.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

GOETHALS, J.